Supreme Court, U.S.
FILED
JUN 18 1998
CLERK

No. 97-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DIKAR, S. COOP. LTDA, - - - - *Petitioner,*

versus

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (MATTHEW HAYMAKER, REAL PARTY IN INTEREST) - - *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 17, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether a defendant, whose motion to dismiss for lack of jurisdiction has been denied with leave to renew, may refuse the District Court's direction to provide full discovery to the plaintiff.

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8 Wright & Miller, Federal Practice and Procedure §2040 p.521 (1994) 6

ORDERS BELOW

The order of the court of appeals, which is unreported, is reprinted at App. 1a. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc is also unreported and is reprinted at App. 3a. The relevant orders of the district court, all of which are unreported, are reprinted at App. 4a-8a.

No. 97-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DIKAR, S. COOP. LTDA, - - - - - - Petitioner,

versus

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (MATTHEW HAYMAKER, REAL PARTY IN INTEREST) - - - Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Factual Background

On September 26, 1996, Matt Haymaker purchased a muzzle-loading rifle from the Richmond, Kentucky, Wal-Mart store. The rifle was a Connecticut Valley Arms (hereafter "CVA") .50-caliber "Buckmaster" inline muzzle-loading rifle, which cost $214.96. It was a birthday gift from his parents. At the time, Matt was 22 years old and a student at Eastern Kentucky University.

On October 1, 1996, Matt was firing the rifle for the *first time.* He was accompanied by a friend to a target range, and they alternated shots while setting the sights on the rifle. On approximately the ninth shot, the rear end of the gun barrel exploded in Matt's face, and he suffered catastrophic injuries. He was treated at the U.K. Medical Center for a ruptured globe of the right eye with corneoscleral laceration, facial lacerations, and orbital and maxillary sinus fractures.

Matt has suffered severe permanent damages including the loss of his right eye.

II. Procedural Background

On December 27, 1996, a lawsuit was filed against CVA and Wal-Mart Stores, Inc., in the Scott Circuit Court. On January 28, 1997, the Defendants removed the case to the U.S. District Court for the Eastern District of Kentucky.

Defendant CVA served its answers to Plaintiff's interrogatories in which it stated that it was not the manufacturer of the "muzzle-loader" in question. Since it was not the manufacturer, CVA took the position that it was not required to produce blueprints, diagrams, or any testing documents.

On March 19, 1997, the Plaintiff moved to file an Amended Complaint adding two additional defendants, including (a) Dikar, S. Coop. LTDA., Bergara, Spain (manufacturer of the rifle); and (b) Gene Sears Supply Co., El Reno, Oklahoma (supplier of the rifle to Wal-Mart).

On July 30, 1997, Defendant Dikar filed its Motion to Dismiss the Amended Complaint on the ground that the district court lacked personal jurisdiction. Attached to this motion was an affidavit of a Dikar executive. As another attachment to its motion, Dikar submitted a bill of lading indicating that Matt's Buckmaster rifle was one of a shipment of 398 identical rifles, along with 3,175 other rifles, sent to CVA in the United States.

At the time of this motion, only one deposition had been taken by any party in this case. This was a deposition of Neill Stevens, Vice President of a claims adjusting service retained by CVA. In the course of his deposition, Mr. Stevens disclosed thirteen other incidents which involved various similarities, including:

1. All involved a new or nearly new .50 caliber inline muzzle-loading rifle sold by CVA and manufactured by Dikar;

2. All involved barrel explosions, many involved serious eye damage, and they occurred between September and December 1996;

3. Four of these other incidents occurred in Kentucky, three in Ohio, two in Virginia, two in Tennessee, one in Louisiana, and one in Michigan.

Plaintiff responded to the motion to dismiss on the merits, citing the relevant law and the evidence as it was known at that time (App. 9a).

On August 19, 1997, the district court *denied* Dikar's motion for dismissal on jurisdictional grounds, saying that Dikar could renew its motion following the completion of "*all* discovery" (App. 4a).

On August 26, 1997, Dikar filed its Motion for Modification of the August 19 Order, asking the district court to expressly limit discovery to jurisdictional issues. Dikar also asked for leave to take an interlocutory appeal of the earlier Order.

On September 11, 1997, Plaintiff served his Response to Dikar's Motion to Limit Discovery, pointing out the inefficiency of splitting the discovery, the discretionary nature of the district court's ruling on scope of discovery, and the ultimate need for all the discovery from Dikar as part of Plaintiff's case against the other parties.

On October 8, 1997, the district court entered an Order specifically denying Dikar's motion for modification and

specifically reaffirming its earlier Order "granting open discovery as opposed to limited discovery pertaining only to the personal jurisdiction issue." The Order also refused to certify the issue for an interlocutory appeal (App. 5a).

On December 17, 1997, the district court granted Plaintiff's motion to depose representatives of Dikar in Spain, pursuant to the Federal Rules of Civil Procedure (App. 7a). The order further provided that ". . . deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues . . . ."

ARGUMENT

A. Dikar is Not Entitled to Mandamus Because The District Court Has Ruled on Personal Jurisdiction

Dikar's entire factual premise for its Petition for Mandamus is incorrect, since the district court has properly ruled on and *denied* Dikar's motion to dismiss for lack of personal jurisdiction. Dikar has suggested to this Court that Plaintiff's only response to Dikar's motion to dismiss was that it was premature. This is incorrect. Plaintiff's Response of August 15, 1997, cited the applicable law and the available discovery (App. 9a).

Plaintiff's response cited Sixth Circuit decisions as to personal jurisdiction under the Due Process Clause. Then Plaintiff argued that Dikar had met the requirements of personal jurisdiction, since it had manufactured hundreds of firearms for an American distributor, CVA, with the intention (according to Dikar's own affidavit) that they be sold and used in the United States. Plaintiff recited the proof (in Dikar's affidavit) that Dikar did not limit the states in which CVA could distribute the rifles. Plaintiff pointed out that CVA is the *only* company that distributes Dikar's sporting guns in the U.S. (once again from Dikar's affidavit) and that it received substantial profits from their

sale in Kentucky, as well as other states. Plaintiff argued the merits of the requirements of (a) purposeful availment, (b) actions in Kentucky, and (c) reasonableness of the exercise of jurisdiction.

The proof, even at that time, showed that the motion should be denied on the merits. This is what the district court has clearly done. The district court's order of August 19 states that the motion to dismiss was "denied." It was *not* held in abeyance. The district court did not rule that the motion was premature. The court simply decided the issue before it. The district court had more than enough evidence on which to conclude that Dikar's motion to dismiss was without merit. In the absence of an evidentiary hearing, it is the district court's duty to consider all proof on such a motion in the light most favorable to the plaintiff, *Nationwide Mutual Ins. Co.* v. *Tryg International Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996), and the plaintiff need only make a *prima facie* showing of personal jurisdiction, *International Technologies Consultants, Inc.* v. *Euroglas S.A.*, 107 F.3d 386, 391 (6th Cir. 1997).

The district court's ruling on the issue was further emphasized on October 8, when the Court reaffirmed its Order and denied Dikar's motion to specifically limit discovery to jurisdictional issues. Once again, the district court did not hold that the issue was in abeyance or was premature; instead, it *denied* the motion.

In short, Dikar has failed to show that it is clearly entitled to relief, since it cannot even demonstrate the basic factual premise of its motion. The pleadings, proof and orders demonstrate that the district court has ruled on Dikar's motion. Discovery on all issues should now proceed under the Federal Rules of Civil Procedure. *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 542 (1987).

B. The Requirements of Mandamus Have Not Been Shown in This Case

Even if Dikar were correct, and the district court had not yet decided the motion to dismiss for lack of personal jurisdiction, Dikar would not be entitled to mandamus.

As the cases cited by the court of appeals panel pointed out, in denying Dikar's mandamus petition, mandamus is not available to control the district court in the exercise of its discretionary duties. *In re American President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991); *In re Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983). Here, the ruling of the district court to which Dikar objects is its order that the discovery methods under the Federal Rules of Civil Procedure may be used to take discovery from the Spanish manufacturer, both as to jurisdiction and as to the merits of this products liability case. This matter is part of the Court's discretion in balancing the needs and rights of the parties in pre-trial discovery activity. The scope of discovery is within the Court's discretion. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir 1981), *cert. denied*, 454 U.S. 893 (1981); *Theunissen* v. *Matthews*, 935 F.2d 1454, 1465 (6th Cir. 1991). A District Court *need not* limit discovery to jurisdictional questions. The Court's discretion to limit discovery is discussed in 8 Wright & Miller, *Federal Practice and Procedure* §2040 p.521 (1994):

> Ever since the days of the former equity bill for discovery there has been applied to discovery "the principle of judicial parsimony," by which, when one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided. In accordance with this principle — *a salutary principle if it is applied sparingly and with real discretion rather than as an absolute rule* — a court may decide that in a particular case it would be wise to stay discovery on the merits until

challenges to jurisdiction have been resolved. [Emphasis added.]

This discretionary decision of the district court should not be disrupted by piecemeal appeals such as this one.

The panel's cited cases also make it clear that mandamus is generally not available to review discovery orders. *Warden, Kentucky State Penitentiary* v. *Gall*, 865 F.2d 786, 788-9 (6th Cir. 1989); *City of Cleveland* v. *Krupansky*, 619 F.2d 572, 575 (6th Cir.) *cert. denied*, 449 U.S. 834 (1980). There is a recognized exception where discovery raises questions of unusual importance necessary to the economical and efficient administration of justice. Here, all those considerations of economy and efficiency all support the district court's ruling.

In its Petition, Dikar concedes that it is proper to use the federal discovery rules to address the issue of jurisdiction. However, it objects to Plaintiff asking, in the same discovery procedure, whether it be a deposition or interrogatories or requests for documents, other questions concerning the exploding rifle. These matters would include the rifle's blueprints, design, material specifications, testing, and the like. For the sake of economy and efficiency, this should be done at the same time Plaintiff's counsel are in Spain questioning Dikar's representatives as to its contacts with other Defendants, contacts with other entities in the United States, a study prepared for Dikar discussing the United States market for muzzle-loading rifles (produced in discovery), and other efforts to market its rifles in this country.

The logistics of a single trip to Spain for depositions of knowledgeable Dikar representatives will be expensive and time-consuming. To force Matt Haymaker to engage in *two* such trips is to unfairly punish him, since he can less easily afford these expenses than an insurer or the corporate defendants. This burden is unreasonable for this plain-

tiff and for those plaintiffs in the many other injury incidents which have been identified.

It would be a massive waste of judicial resources, and an intimidating doubling of a plaintiff's expenses and effort, to permit every case where lack of jurisdiction is pled to include:

(1) a discovery stage for jurisdiction,

(2) a hearing stage for jurisdiction,

(3) an appellate stage for jurisdiction, followed by

(4) a discovery stage on the merits, then

(5) a trial stage on the merits, and then

(6) an appellate stage on every other matter not raised earlier.

Yet this is exactly what Dikar seeks. It should not be permitted, under the principle of F.R.C.P. 1, which directs that the rules ". . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

The real motives of Dikar are delay and denial of discovery to the Plaintiff. In discovery responses, Dikar has asserted the joint defense privilege, based on its cooperation with Defendant Connecticut Valley Arms. The delay is designed to impede the Plaintiff's access to discovery which is critical to the case against both Defendants. This includes the basic design, materials specifications, and testing for the rifle. On all of these issues, the U.S. distributor CVA claims ignorance. Delay and denial prevent this case from going forward, and delays all the other cases against CVA and Dikar as well.

CONCLUSION

This Court should deny the Petition for Certiorari filed by the Petitioner Dikar, S. Coop. LTDA.

June 17, 1998

Respectfully submitted,

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APPENDIX

Appendix A—Court of Appeals' Order, denying mandamus, filed February 11, 1998 ..... 1a

Appendix B—Court of Appeals' Order, denying rehearing, filed April 23, 1998 ..... 3a

Appendix C—District Court's Order filed August 19, 1997 ..... 4a

Appendix D—District Court's Order filed October 8, 1997 ..... 5a

Appendix E—District Court's Order filed December 17, 1997 ..... 7a

Appendix F—Plaintiff's Response to Dikar's Motion To Dismiss and Plaintiff's Motion for Leave to Take Additional Discovery, filed August 15, 1997 ..... 9a

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 98-5001

In re: DIKAR, S. COOP. LTDA, - - *Petitioner,*

ORDER—Filed February 11, 1998

Before: CONTIE, NORRIS, and CLAY, Circuit Judges.

The petitioner, a foreign defendant in this products liability action, seeks a writ of mandamus directing that discovery in this action be limited to personal jurisdiction issues until after the district court determines whether it can exercise personal jurisdiction over the petitioner. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of discretionary duties." *In* re *American President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991) (order) (citations omitted); *see In re Post-Newsweek Stations*, 722 F.2d.325, 329 (6th Cir. 1983).

Generally, mandamus is not available to review discovery orders. *See Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786, 788-89 (6th Cir. 1989); *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curiam). *cert. denied*, 449 U.S. 834 (1980). ln limited circumstances, however, mandamus is available to review pre-

trial discovery rulings. Where a discovery ruling raises "questions of unusual importance necessary to the economical and efficient administration of justice," it may be reviewed in mandamus. *FDIC v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990) (quoting *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1060 (6th Cir. 1982)).

We will not exercise our authority in mandamus to intervene in the district court's management of pretrial discovery in this case. The petitioner has not clearly demonstrated that the district court's orders permitting discovery under the Federal Rules of Civil Procedure are erroneous as matter of law. *See Societe Nationale Industrielle Aerospariale v. United Stares District Court of the Southern District of Iowa*, 482 U.S. 522, 541 (1987) (holding that the Hague Convention procedures for taking evidence abroad are not exclusive or mandatory).

It therefore is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 98–5001

IN RE: DIKAR, S. COOP. LTDA, - - - *Petitioner.*

ORDER—Filed April 23, 1998

Before: CONTIE, NORRIS, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but aiso to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 97-28

MATTHEW HAYMAKER - - - - - *Plaintiff*

versus

CONNECTICUT VALLEY ARMS; AND
WAL-MART STORES, INC. - - - - *Defendants*

ORDER—Filed August 19, 1997

The Defendant Dikar, S. Coop. LTDA having moved to dismiss the Complaint against it, on the ground of lack of personal jurisdiction, the Plaintiff having responded, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the PIaintiff's motion for leave to conduct additional discovery is GRANTED Following the completion of all discovery, thc Defendant Dikar may renew any dispositive motion concerning jurisdictional issues.

This 19th day of August, 1997.

/s/ Karl S. Forester
Judge, U.S. District Court

Copies to Counsel

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 97-028

MATTHEW HAYMAKER, - - - - *Plaintiff,*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR, S. COOP LTDA, and
GENE SEARS SUPPLY COMPANY, - - *Defendant.*

ORDER—Filed October 8, 1997

This matter is before the Court upon the Motion of the defendant, Dikar, S. Coop LTDA ("Dikar") for modification of the Orders this Court entered on August 5 and 19, 1997, to wit, the Order for Meeting and Report and the Order granting open discovery as opposed to limited discovery pertaining only to the personal jurisdiction issue. Moreover, Dikar requests that if this Court denies its Motion to Modify said Orders, that the Court certify the issue pursuant to 28 U.S.C. § 1292(b) for appellate review and stay the respective orders pending resolution of the appeal. The Court, having read the parties' briefs and remaining confident in its previous ruling and being otherwise fully and sufficiently advised, HEREBY ORDERS THAT DEFENDANT'S MOTION TO MODIFY SAID ORDERS [docket entry 28] IS DENIED. FURTHER, THIS ISSUE SHALL NOT BE CERTIFIED FOR APPEAL.

This 8th day of October, 1997.

/s/ Karl S. Forester
Karl S. Forester, Judge

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 97-028

MATTHEW HAYMAKER, - - - - - - *Plaintiff,*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR S. COOP. LTDA, and
GENE SEARS SUPPLY CO., - - - - - *Defendants.*

ORDER—Filed December 17, 1997

This matter is before the Court upon the motion of the plaintiff, Matthew Haymaker, to conduct the depositions of representatives of Dikar, S. Coop. LTDA ("Dikar"), set to be taken in Spain. in the above-styled action pursuant to the Federal Rules of Civil Procedure [docket entry 54], and upon plaintiffs motion to co mpel defendant Dikar, S. Coop. LTDA, to answer plaintiffs discovery requests and for sanctions [docket entry 55], Defendant filed its response to the same on December 8, 1997 [docket entry 61], to which plaintiff filed his reply on December 10,1997 [docket entry 63]. Accordingly, all matters are ripe for review.

The Court, being Otherwise hilly and sufficiently advised, hereby ORDERS THAT:

1) the motion of the plaintiff to conduct the depositions of representatives of Dikar, set to be taken in Spain, in the ab ove-styled action pursuant to

the Federal Rules of Civil Procedure [docket entry 54], IS GRANTED:

2) deponents' responses in said depositions SHALL NOT be limited to questions concerning only jurisdictional issues;

3) the motion of the plaintiff to compel defendant Dikar to answer plaintiff's dis covery requests which are not related to jurisdictional issues, as the Court had specifically ruled that discovery is to be wide-open and not limited to jurisdictional issues, [docket entry 55] IS GRANTED TO THE EXTENT THAT DEFENDANT'S ONLY OBJECTION TO SUCH REQUESTS ARE THAT tHEY EXCEED THE SCOPE OF JURISDICTIONAL ISSUES; and

4) the motion of the plaintiff for sanctions pursuant to Fed.R.Civ.P. 37(b)(2) for defendant's failure to answer plaintiff's discovery requests in violation of this Court's orders [docket entry 55] IS PASSED UNTIL THE COMPLETION OF TRIAL.

This 17th day of December, 1997.

/s/ Karl S. Forester
Karl S. Forester, Judge

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Civil Action No. 97-28

MATTHEW HAYMAKER - - - - - - *Plaintiff*

versus

CONNECTICUT VALLEY ARMS,
WAL-MART STORES, INC.,
DIKAR S. COOP. LTDA, and
GENE SEARS SUPPLY CO. - - - - - *Defendants*

PLAINTIFF'S RESPONSE TO DIKAR'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO TAKE ADDITIONAL DISCOVERY

—Filed August 15, 1997

I. INTRODUCTION

Defendant Dikar, S. Coop. LTDA. (hereafter "Dikar") has filed its Motion to Dismiss Plaintiff's Amended Complaint, supported by affidavits. Plaintiff would show to the Court that the motion should not be granted for two reasons:

i. The facts, even as recited by Dikar, do not entitle it to be dismissed based on lack of personal jurisdiction; and

ii. The motion is premature, since Plaintiff has had no opportunity to conduct discovery concerning the jurisdictional issues, from Dikar or other defendants with knowledge.

A. SUMMARY OF FACTS

On September 26, 1996, Matt Haymaker purchased a muzzle loading rifle from the Richmond, Kentucky, Wal-Mart store. The rifle was a Connecticut Valley Arms (hereafter "CVA") .50-caliber "Buckmaster" inline muzzle-loading rifle, which cost $214.96. It was a birthday gift from his parents. At the time, Matt was 22 years old and a student at Eastern Kentucky University.

On October 1, 1996, Matt was firing the rifle for the first time. He was accompanied by a friend to a target range, and they alternated shots while setting the sights on the rifle. On approximately the ninth shot, the rear end of the gun barrel exploded in Matt's face, and he suffered catastrophic injuries. He was treated at the U.K. Medical Center. The operative report describes the following injuries:

1. Ruptured globe of the right eye with corneoscleral laceration;
2. Facial lacerations;
3. Orbital and maxillary sinus fractures.

Matt has suffered severe permanent damages including the loss of sight in his right eye.

An illustration of the rifle is attached as Exhibit "A."

B. SUMMARY OF THE LITIGATION

On December 27, 1996, a lawsuit was filed against CVA and Wal-Mart in the Scott Circuit Court. On January 28, 1997, the Defendants removed the case to the U.S. District Court, Eastern District of Kentucky.

On February 13, 1997, the Court ordered counsel for the parties to conduct a meeting as required by Rule 26(f) and to file a written Joint Report no later than March 24, 1997.

In the meantime, CVA served its Answer to Plaintiff's Interrogatories in which it stated that it was not the manufacturer of the "muzzle loader" in question. Since it was not the manufacturer, CVA took the position that it was

not required to produce blueprints, diagrams, or any testing documents.

On March 19, 1997, Plaintiff moved to file an Amended Complaint adding the following additional parties:

1. Dikar, S. Coop. LTDA., Urarte Kalea 26, Poligono Industrial San Lorenzo, 20570 Bergara, Spain; manufacturer of the rifle.
2. Gene Sears Supply Co., P.O. Box 38, El Reno, Oklahoma 73036; supplier of the rifle to Wal-Mart.

The information pertaining to the manufacturer and supplier was provided by counsel for the other Defendants by letter of March 10, 1997. See Exhibit "B."

On March 18, 1997, counsel for Plaintiff and counsel for CVA and Wal-Mart filed a "Joint Motion for Extension of Time" to comply with FRCP 26(f). The basis for the motion was the need to serve the additional Defendants, one of which required service under the Hague Convention. This motion was sustained by the Court's Order of March 26, 1997.

On July 30, 1997, Defendant, Dikar filed its Motion to Dismiss the Amended Complaint on the ground that the Court lacks personal jurisdiction. Absolutely no discovery has been taken from Dikar, or from the other parties concerning their relationship with Dikar. On August 5, 1997, the Court directed all parties to conduct a meeting pursuant to Rule 26(f) and to file a written report no later than September 15, 1997.

Only one deposition has been taken by any party in this case. This was a deposition of Neill Stevens, Vice President of a claims adjusting service retained by CVA. A copy is attached as Exhibit "C." Mr. Stevens was deposed by the Plaintiff on July 14, 1997, concerning his knowledge of Matt Haymaker's case and his knowledge of other similar occurrences. In the course of his deposition, Mr. Stevens disclosed thirteen other incidents which involved the following similarities:

1. They all involved a similar .50 caliber in-line muzzle loading rifle;
2. They all involved rifles that were new or relatively new;
3. They all involved barrel explosions which resulted in injuries to the user, many involving serious eye damage;
4. All of the other incidents occurred between September 1996 and December 1996;
5. Four of these other incidents occurred in Kentucky, three in Ohio, two in Virginia, two in Tennessee, one in Louisiana, and one in Michigan.

In Attachment 2 to its Motion, Dikar submitted a bill of lading indicating that Matt's Buckmaster rifle was one of a shipment of 398 identical rifles, along with other rifles, sent to CVA in the United States.

II. ARGUMENTS

A. DISMISSAL OF DIKAR WOULD VIOLATE DUE PROCESS, AND WOULD BE GROSSLY UNFAIR TO THE PLAINTIFF

The pertinent long-arm statute is K.R.S. 454.210, which permits the Court to exercise jurisdiction over Dikar so long as the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution are satisfied.

In order to satisfy the requirements of the Due Process Clause, the Sixth Circuit has established three elements which must be met. Those include:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147, 150 (6th Cir. 1997) (quoting Southern Machinery Co., v. Mohasco Industries, Inc., 401 F.2d 374 (6th Cir. 1968)).

1. Dikar Purposely Availed Itself of Access to Kentucky's Markets

The first issue is whether or not Dikar purposely availed itself of the privilege of acting in the forum state or causing a consequence in the forum state. In Poyner v. Erma Werke GMBH et al., 618 F.2d 1186 (6th Cir. 1990). *cert. denied*, 449 U.S. 841 (1980), the Defendant, a German gun manufacturer, utilized the services of an American based distributor. The Sixth Circuit held that "The use of an independent distributor so that the manufacturer is only indirectly responsible for the product reaching an injured consumer, in and of itself, will not insulate a non-resident foreign corporation from suit." Id. at 1190 (citing Everly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969)).

There is a difference in the parties' interpretation of applicable cases. First, Dikar relies on World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) to argue that foreseeability of a product's sale in a forum is not enough, standing alone, to satisfy the purposeful availment requirement. However, in World-Wide Volkswagen Corp, this requirement of additional contact was met because the defendant benefitted continually from what he knew to be sales of his product by merchants in the forum state. Likewise, Dikar placed this exploding rifle (and other exploding rifles) into the stream of commerce in this country, without regard for the ultimate location of sale, and it profited from the sales of this rifle and others like it in the Commonwealth of Kentucky.

Dikar also relies on Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) for the proposition that the placement of a product into the stream of commerce, without more, is not enough to satisfy this due process. It should be pointed out that personal jurisdiction over the defendant in Asahi was denied on other

grounds than purposeful availment. Id at 102. On that non-dispositive issue, four members of the Court concluded that jurisdiction premised on the placement of a product into the stream of commerce, with knowledge of marketing but without a showing of additional conduct, is consistent with the Due Process Clause. Id. at 104. Plaintiff also believes, and has asked leave to conduct discovery to show, that there are additional jurisdictional contacts between Dikar and the forum.

In addition, Dikar cites Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270, 274 (Ky. App. 1991) in support of its argument that this purposeful availment element has not been met. However, Halderman is easily distinguishable from the case at hand. The product in Halderman, a Winget dumper, was sold in Ohio and was never even distributed in Kentucky. "It was merely fortuitous that one Winget dumper ended up in Kentucky." Id. Here, it was not merely fortuitous that Matt Haymaker's exploding rifle ended up in Kentucky. The rifles were and continue to be regularly sold in retail stores in Kentucky.

None of the remaining Sixth Circuit cases relied upon by Dikar are products liability cases. That fact alone is enough to distinguish those from the case at hand. International Technologies Consultants, Inc. v. Euroglas S.A., 107 F.3d 386 (6th Cir. 1997) involved conversion of intellectual property and misappropriation of trade secrets. Conti v. Pneumatic Products Corp., 977 F.2d 978 (6th Cir. 1992) involved fraud and misrepresentation. Finally, Nationwide Mutual Ins. Co. v. Tryg International Ins. Co., 91 F.3d 790 (6th Cir. 1996); Kerry Steel, 106 F.3d 147; and Market/Media Research Inc. v. Union Tribune Publishing Co., 951 F.2d 102 (6th Cir, 1991), cert. denied, 506 U.S. 824 (1992) all involved a breach of contract.

The record reveals that Dikar manufactured hundreds of firearms for an American distributor, CVA, with the intention that the guns would be used in the U.S. and with knowledge that they would be sold in retail outlets throughout this country. Dikar placed no restrictions or limita-

tions on CVA's distribution. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. Matt's case is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Based upon the foregoing, Dikar's activities satisfy the necessary purposeful availment requirement.

2. Plaintiff's Cause of Action Arises from Dikar's Activities in Kentucky

This element requires that Matt's claim have a substantial connection with Dikar's in-state activities. Kerry Steel, Inc., supra, 106 F.3d at 152; Southern Machinery Co., supra, 401 F.2d 374. Plaintiff previously demonstrated Dikar's connection with Kentucky. Dikar's sale of hundreds of rifles to CVA with no restriction as to the area where they were distributed in the U.S., coupled with Dikar's substantial profit on the sales of these rifles in Kentucky, as well as the subsequent Kentucky explosion of several rifles resulting in injuries, is sufficient to satisfy this requirement. Matt's claim, based on his injuries sustained, is directly related to Dikar's activity, the manufacture of exploding rifles distributed and sold in Kentucky.

3. It Would be Reasonable for this Court to Exercise Personal Jurisdiction Over Dikar

Finally, the question is whether or not the exercise of jurisdiction over Dikar would be reasonable. In its brief, Dikar pointed out that the Asahi plurality cautioned lower courts to make "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case," guided by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state." 480 U.S. at 115. This involves three inquiries.

The first inquiry is whether it is reasonable, from Dikar's perspective, to exercise jurisdiction over it. Dikar should have anticipated being haled into court in Ken-

tucky. Dikar manufactured hundreds of firearms for an American distributor, CVA, with the intention that the guns would be used in the U.S. and with knowledge that they would be sold in retail outlets throughout the this country. Dikar placed no restrictions on CVA's distribution in the U.S. Moreover, CVA is the only company that distributes Dikar manufactured sporting guns in the U.S. This is not an isolated occurrence, nor did this rifle end up in Kentucky fortuitously. The sale of this exploding rifle, and others similar to it, arose from an effort to serve the U.S. market, including Kentucky. Under these circumstances, it is unjust to permit Dikar to plead ignorance as to where the guns were actually sold and escape the jurisdiction of this Court.

Second, the forum's interest in adjudicating the dispute is another factor to be considered. Asahi Metal Industry Co., Ltd., supra, 480 U.S. at 115; Poyner, supra, 618 F.2d at 1192. Claims based on injuries caused by inherently dangerous products imported through independent distributors fall within that class of litigation which the forum state has a deep interest in adjudicating. Poyner, supra, 618 F.2d at 1192. Kentucky's interest in adjudicating this dispute is heightened by the fact that there are four other cases in Kentucky identical to the one at hand. Additionally, Kentucky has a manifest interest in protecting its residents from distant, possibly harassing litigation, particularly when, as here, the injury took place in Kentucky and the product was distributed and sold in Kentucky.

Finally, the plaintiff's interest in obtaining convenient and effective relief is a relevant factor to be considered in determining the reasonableness of requiring a nonresident defendant to litigate a claim in the forum state. Asahi Metal Industry Co., Ltd., supra, 480 U.S. at 115; World-Wide Volkswagen Corp, supra, 444 U.S. at 292. When a foreign corporation such as Dikar places goods into the stream of commerce for distribution throughout the U.S. and it derives substantial revenue from the distribution of

same, it is reasonable that claims emanating from injuries caused by the defective product be litigated where the sale occurred and the injured victim is found. Otherwise, the other thirteen victims injured by these exploding rifles, like Matt, would have no recourse to justice anywhere in the United States. It is not as if the alternative forums here are Ohio or New York or California; rather, there would be no alternative U.S. forum. This is fundamentally unfair and unjust.

It is clear that Matt Haymaker and the Commonwealth of Kentucky, as well as the other injured victims in this state, have a significant interest in having this dispute litigated in Kentucky. Their interest substantially outweighs any burden which may be imposed on Dikar.

B. PLAINTIFF IS ENTITLED TO DISCOVERY AS IT RELATES TO THE JURISDICTIONAL ISSUE

It is clear that Dikar's motion is in reality one for summary judgment, since it relies on the tendered affidavits of Dikar representatives as to its activities in making, selling, advertising and marketing this and other firearms. The "motion to dismiss" must therefore be decided under the principles relating to summary judgments, found in F.R.C.P. 56. One of these principles is that a party is not entitled to summary judgment until the opposing party has had a reasonable opportunity to discover the relevant facts as to the issues in question. Vance v. U.S., 90 F.3d 1145, 1148 (6th Cir. 1996) (citing Whites Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 231-232 (6th Cir. 1994)) held that:

> If the non-movant makes a proposed timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.

There has been no opportunity for discovery here, since discovery must follow the initial meeting of the parties. The Court has just issued its Order for the initial meeting including the new parties Dikar and Gene Sears Supply

Company, which must be held by September 5, 1997. Plaintiff must have an opportunity for reasonable discovery from Dikar and from other parties, such as CVA, which had dealings with Dikar or which have knowledge of Dikar's activities. Such discovery has not yet been done and could not be done in the absence of Dikar as a party.

Plaintiff must have the right to discover, from both Dikar and CVA, (a) the documents, including correspondence and agreements, surrounding the sale of this rifle, (b) the discussions between the parties, (c) the activities of Dikar to market its products in the world market, including its admitted intent that this rifle be used in the United States, (d) the manner in which Dikar came to CVA's attention, (e) the nature of any exclusive rights by CVA to market Dikar's rifles in this country, and (f) Dikar's knowledge of the marketing and sales of this rifle in the U.S.

Plaintiff hereby moves for leave to conduct this additional critical discovery. This Court should grant Plaintiff's motion for additional discovery and permit the discovery to proceed before any motion for summary judgment pursuant to F.R.C.P. 56 is considered. Dikar may wish to renew its motion on jurisdictional grounds at the completion of the discovery.

III. CONCLUSION

Dikar's claim that this Court lacks jurisdiction would completely frustrate the intent of the Kentucky Long Arm Statute, and would leave Matt Haymaker without any practical resource against the maker of the exploding rifle which mangled his face and eye. Such a decision would also be a blow to the thirteen other consumers injured since September 1996, and to others injured in the future. Nothing could be more unfair than for Dikar to make this exploding rifle for sale in the U.S., to reap the profits from its sale as intended in numerous states, and to avoid the consequences when its rifles maim the consumers. In addition, Dikar wants to unfairly deprive the Plaintiff of any right to discover the facts to show that Dikar is subject to jurisdiction.

Based upon the foregoing reasons, the "motion to dismiss" filed by Dikar should be denied. Such dismissal would preclude Dikar from being amenable to suit anywhere in the United States.

In addition, the Court should grant Plaintiff's motion to conduct discovery from Dikar as it relates to the jurisdictional issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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